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EXAMINER

MADSEN, ROBERT A

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 06/19/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/921,361

Applicant(s)

WYSLOTSKY ET AL.

Examiner

Robert Madsen

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-31 and 33-35 is/are pending in the application.
- 4a) Of the above claim(s) 12, 13 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-11, 14-31, 33-35 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on ____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 3, 4.
- 4) ☒ Interview Summary (PTO-413) Paper No(s) 6.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

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DETAILED ACTION

Election/Restrictions

1. Restriction to one of the following inventions is required under 35 U.S.C.

121:

- I Claims 1-11,14-31,33-35 drawn to a method of controlling oxygen for a food package, classified in class 426, subclass 397.
- II Claim 12, drawn to a method of selecting films to provide oxygen partial pressure for fruits and vegetables, classified in class 426, subclass 419.
- III Claim 13, drawn to a method of selecting films to provide constant partial pressure of oxygen, classified in class 426, subclass 418.

2. The inventions are distinct, each from the other because:

3. Invention I and Invention II are unrelated inventions. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different modes of operation, different functions, or different effects (MPEP § 806.04, MPEP § 808.01). In the instant case the invention II does not recite any steps for selecting the films, and thus the inventions have different modes of operation. Invention II does not suggest that the film is to be used in forming a portion of a package with the selected film. Instead, the film could be used as an air filter to maintain a particular level of oxygen.

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4. Invention I and Invention III are unrelated inventions. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different modes of operation, different functions, or different effects (MPEP § 806.04, MPEP § 808.01). In the instant case the invention III does not recite any steps for selecting the films, and thus the inventions have different modes of operation. Invention III does not suggest that the film is to be used in forming a portion of a package with the selected film. Instead, the film could be used to provide a constant partial pressure of oxygen in medical instrument package.
5. Inventions II and III are unrelated inventions. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different modes of operation, different functions, or different effects (MPEP § 806.04, MPEP § 808.01). In the instant case the invention III does not require that the film with constant oxygen partial pressure be used for fruits or vegetables, and thus the inventions have different modes of operation. Instead, the film could be used to provide a constant partial pressure of oxygen in medical instrument package, where oxygen generation (or respiration) is not an issue.
6. Because these inventions are distinct for the reasons given above and have acquired a separate status in the art because of their recognized divergent subject matter, restriction for examination purposes as indicated is proper.
7. During a telephone conversation with Robert Ross on June 2, 2003 a provisional election was made with traverse to prosecute the invention of group I, claims 1-11,14-31,33-35 (See the Interview Summary included with this office

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action). Claims 12 and 13 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Suggested Amendments

8. Claims 17, 18, and 27 all lack antecedent basis for the use of "said label material", "said label material, and "said sealable strip", respectively. It is suggested that these claims be amended to better define the features. For examination purposes, claims 17 and 18 are understood to be the label material described in claim 16, and claim 27 is understood to be "a sealable strip".

Claim Rejections - 35 USC § 102

9. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this

Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

10. Claims 1-3, 7, 9, 10, 11, 14, 15, 21, 25, 27 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Antoon Jr. (US 5045331).

11. Regarding 1-3, 21, 25, 27 see Figures, Column 3, line 46 to Column 4, line 16, Column 4, line 37 to Column 5, line 6, Column 6, line 41-59, and Column 7, lines 18-32, understanding the permeable panel attached to a wall or lid to be a laminate of polymeric films and to be the surface area means as recited in

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claims 7,9-11,14,15, that must be properly sized to achieve the desired permeability (Column 4, line 63 to Column 5, line 6).

12. Claims 1-4 ,7,9-11,14-17,21, 25-27,31,33 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Jones (US 4830863).

13. See the embodiment depicted in Figure 9 (i.e. Column 7, lines 28-36) in light of Column 1, lines 11-49,Column 2, lines 8-58, Column 3, lines 5-58, and Column 6, lines 48-64, wherein the surface area increasing means, as recited in claim 7, is the label may comprise microporous polypropylene that increases the value of oxygen permeability of the lid perforations when removed, and it is "adjusted" by peeling in the embodiment of Figure 9 (Column 7, lines 14-20 and 28-36).

14. Claims 1,3,7,9-11,15, 17,18,22,25-27,31,33, and 34 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Brady (US 5916615).

15. Regarding claims 1,3,7,9-11,15, 22,25-27,31,33, and 34 see Column 5, lines 2-26, Column 8, lines 1-9,61-66, Column 8, line 60 to Column 9, line 27, wherein the peelable lid, or even the support (Column 9, lines23-27), provides the surface area increasing means for increasing the oxygen permeability.

16. Regarding claims 17 and 18, Brady et al. teach the support layer may comprise foamed PE or PP and may also be peelable to remove to increase oxygen permeability (Column 8, line 60 to Column 9, line 27).

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17. Claims 1-4 ,7,9,14-16,19, and 20 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Floyd et al. (US 5908649). See figures 4,5,5a in light of Column 8, lines 45- 64,Column 9, lines 16-32, Column 10, lines 16-50, and Column 11, line 15 to Column 12, line 12, where Floyd et al. teach about 0.5 microns is suitable for a label and about 25 microns is suitable for a container.

18. Claims 1,3,7,9,10,11,15,22,25,26,27,31, and 33 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Krebs et al. (US 6015583). See Column 2, lines 1-43,Column 3, lines10-58,Column4,lines 28-55, Column 5, lines 1-35, and Column 6, lines 60-67.

19. Claims 1-4 and 22 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Bedrosian et al. (US 4423080). See Column2, lines 1-31, Column 3, line 45 to Column 4, line 30.

Claim Rejections - 35 USC § 103

20. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

21. Claims 5 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jones (US 4830863) as applied to claims 1-4 ,7,9,10,11,14-17,21, 25-27,31,33 above, further in view of Brady (US 5916615).

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22. Jones teaches the peelable portion of the lid, or label, comprises PP, but is silent in teaching expanded PP or PE. Brady is relied on as evidence of forming the outer peelable layer of a produce package of either un-expanded PP or expanded PP, as well as expanded PE, so that one can increase oxygen permeability (Column 8, line 60 to Column 9, line 27). Therefore, it would have been obvious to modify Jones and select expanded PP or expanded PE since Brady teaches these are known equivalents for PP in the outer/peelable layer of a produce package and one would have been substituting one conventional outer layer for another for the same purpose.

23. Claims 28-30,35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Krebs et al. (US 6015583) as applied to claims 1,3,7,9,10,11,15,22,25,26,27,31, and 33 above, further in view of Tomlinson (WO 99/62764).

24. Krebs et al. teach a sealed gas impermeable package (i.e. hermetically sealed as recited in claim 30) containing meat having a package element that provides selected oxygen permeability, an initial nitrogen and carbon dioxide atmosphere as recited in claim 35, and any preferred shape (Column 2, lines 1-43, Column 3, lines 10-58, Column 4, lines 28-55, Column 5, lines 1-35, and Column 6, lines 60-67), but is silent in teaching a dome lid and a male/female connection for the lid as recited in claims 28, 29, and 30. Tomlinson also teaches a meat package, but teaches that the conventional tray design is difficult to handle and are not well suited for carry-out and on-the-go consumption (Page

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1, lines 12-25). Tomlinson is relied on as evidence of the conventionality of providing a leak proof package having a domed shaped lid with male/female mating members for a fruits/vegetables/meats package to provide a easier to handle and more convenient package (Page 4, lines 1-6, Page 6, line 1 to Column 7, line 3). Therefore, it would have been obvious to modify the tray of Krebs et al. to form a dome lid/ cup combination since this provides a more convenient way to handle the package and one would have been substituting one conventional leak-proof meats package design for another.

25. Claims 8,23, and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Antoon Jr. (US 5045331). as applied to claims 1-3, 7,9,10,11,14,15,21, 25,27 above further in view of Allers et al. (US 5860549)

26. Antoon Jr. teaches the gas flow in and out of the container depends on the size of the permeable area relative to the total container surface area and the food respiration rate and that permeability is directly proportionate to thickness as recited in claim 24 (Column 2, lines 24-37, Column 4, lines 30-36), but is silent in teaching the inclusion of ribs on the walls to alter the surface area to increase and stiffen the container, as recited in claims 8 and 23.

27. Allers et al. teach adding ribs to the wall of a food package reinforces the structure and prevents damage to the food product, as recited in claim 23 (Column 3, lines 33-59). Therefore, it would have been obvious to include ribs since they would reinforce the structure of Antoon Jr. and protect the food. It would have been further obvious that the ribs would increase the oxygen

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permeability as recited in claim 8 since Antoon Jr. teaches increases in wall surface area (i.e. which would result from the inclusion of ribs) affect the flow rate of gases.

Double Patenting

28. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

29. A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

30. Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

31. Claims 1-11,14-31,33-35 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-32 of copending Application No. 09/924314. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

32. Regarding claims 1-11,14-18, 21-31,33-34 although the conflicting claims are not identical, they are not patentably distinct from each other because the claims 1-29,31,32 differ from the present application claims 1-11,14-18,21-31,33,34 only in the recitation of "placing" a food product versus "disposing" a food product in claim 1.

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33. Regarding claims 19 and 20, to select any particular pore size would have been an obvious result effective variable of the desired oxygen flow since '314 claims selecting micropores for a desired permeability.

34. Regarding claim 35, since '314 claims a low oxygen package, it would have been obvious to select any conventional low oxygen gas mixture to fill the head space volume.

35. Claims 1,3-11,15-18,20,25,26,31, and 33 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 45-53 of copending Application No. 10/211829.

Although the conflicting claims are not identical, they are not patentably distinct from each other because both claim a method of controlling oxygen in a lidded container with an oxygen permeable portion and oxygen impermeable label. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Conclusion


36. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure: Zobel (US 5832699), Zobel (US6296923 B1, and Clarke et al. (US 6376032 B1) teach conventional porous films for food packages. De Moor (US 6013293), Gorlich et al. (US 6051263), and Sanfilippo et al. (US 6221411 B1) teach conventional oxygen permeable food packages comprising labels for controlling the permeability.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703)872-9310 for regular communications and (703)872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.

Robert Madsen
Examiner
Art Unit 1761
June 10, 2003


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